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No. 87-1224

In The

Supreme Court of the United States

October Term, 1987

MARK H. ORING,
Appellant,

vs.

THE STATE BAR OF CALIFORNIA
Appellee.

On Appeal from a Judgment of
the Supreme Court of California

BRIEF OF APPELLEE

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QUESTIONS PRESENTED

1. Whether the California Rules of Professional Conduct regulating lawyer advertising are constitutionally valid in that they:

   a. encourage the free flow of truthful and responsible information to assist the public in recognizing legal problems and in making informed choices as to legal counsel;

   b. permit lawyers any and all forms of advertisement except that which is false, deceptive or coercive, or which fails to contain sufficient information to make the advertisement nondeceptive;

   c. provide for certain standards to inform lawyers as to what type of advertisements are presumed to be

misleading, deceptive or coercive; and

d. provide for the lawyer who runs an advertisement presumed misleading, deceptive or coercive under the standards an opportunity to demonstrate why the advertisement is not misleading, deceptive or coercive.

2. Whether California had reasonable grounds to adopt a standard that lawyer testimonial advertising is rebuttably presumed to be misleading or deceptive.

3. Whether the discipline imposed in this case is proper because the lawyer testimonial advertisement in question is ambiguous and misleading and not entitled to First Amendment protection whether or not the California Presumption is applied.

4. Whether Oring has a right to challenge the imposition of discipline

because of his stipulation which is binding upon him under California law.

5. Whether the high standards of honesty expected of lawyers generally should be lowered by holding that Oring has a constitutionally protected right to air an advertisement that is misleading and ambiguous and fails to provide any relevant hard factual information.

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BRIEF OF APPELLEE

I

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment I:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

United States Constitution, Amendment XIV, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State

wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

California Business and Professions Code Section 6076:

"Rules of Professional Conduct; Formulation

"With the approval of the Supreme Court the Board of Governors [of The State Bar of California] may formulate and enforce rules of professional conduct for all members of the bar in this State."

California Business and Professions Code Section 6077:

"Rules of Professional Conduct; Sanctions for Their Violation

"The rules of professional conduct adopted by the board, when approved by the Supreme Court, are binding upon all members of the State Bar.

"For a wilful breach of any of these rules, the board has power to discipline members of the State Bar by reproval, public or private, or to recommend to the

Supreme Court the suspension from practice for a period not exceeding three years of members of the State Bar."

Rules of Professional Conduct of The State Bar of California

Rule 2-101

"Professional Employment

"This rule is adopted to foster and encourage the free flow of truthful and responsible information to assist the public in recognizing legal problems and in making informed choices of legal counsel.

"Accordingly, a member of the State Bar may seek professional employment from a former, present or potential client by any means consistent with these rules.

"(A) A 'communication' is a message concerning the availability for professional employment of a member or a member's firm. A 'communication' made by or on behalf of a member shall not:

"(1) Contain any untrue statement; or

"(2) Contain any matter, or present or arrange any matter in a manner or format, which is false, deceptive, or which tends to confuse,

deceive or mislead the public; or

"(3) Omit to state any fact necessary to make the statements made, in light of the circumstances under which they are made, not misleading to the public; or

"(4) Fail to indicate clearly, expressly or by context, that it is a 'communication'; or

"(5) State that a member is a certified specialist unless the member holds a current certificate as a specialist issued by the California Board of Legal Specialization pursuant to a plan for specialization approved by the Supreme Court; or

"(6) Be transmitted in any manner which involves intrusion, coercion, duress, compulsion, intimidation, threats or vexatious or harassing conduct.

* * *

"(D) The Board of Governors of the State Bar shall formulate and adopt standards as to what 'communications' will be presumed to violate subdivisions (A) or (B) of this rule 2-101. The standards shall have effect exclusively in

disciplinary proceedings involving alleged violations of these rules as presumptions affecting the burden of proof. 'Presumption affecting the burden of proof' means that presumption defined in Evidence Code sections 605 and 606. The standards formulated and adopted by the Board, as from time to time amended, shall be effective and binding on members of the State Bar.

Standard 2 adopted by the California State Bar Board of Governors pursuant to Rule 2-101(D):

"A 'communication' which contains testimonials about or endorsements of a member is presumed to violate Rule 2-101, Rules of Professional Conduct."

California Evidence Code

Section 115:

"§ 115. Burden of Proof Defined.

"'Burden of proof' means the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court. The burden of proof may require a party to raise a reasonable doubt concerning the existence or nonexistence of a fact or that he establish the existence or nonexistence of a fact by a preponderance of the

evidence, by clear and convincing proof, or by proof beyond a reasonable doubt.

"Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence."

Section 605:

"§ 605. Purpose of Presumptions Affecting Burden of Proof.

"A presumption affecting the burden of proof is a presumption established to implement some public policy other than to facilitate the determination of the particular action in which the presumption is applied, such as the policy in favor of establishment of a parent and child relationship, the validity of marriage, the stability of titles to property, or the security of those who entrust themselves or their property to the administration of others."

Section 606:

"§ 606. Effect of Presumptions Affecting Burden of Proof.

"The effect of a presumption affecting the burden of proof is to impose upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact."

California Business and Professions Code

Section 6025:

"Rules and Regulations; Determination as to Meetings and Quorum

"Subject to the laws of this State, the board may formulate and declare rules and regulations necessary or expedient for the carrying out [of the State Bar Act]. . . ."

Section 6086

"Procedure

"The Board of Governors, subject to the provisions of this chapter, may by rule provide the mode of procedure in all cases of complaints against members."

Rules of Procedure of The State Bar of California

Rule 401:

"RULE 401. STIPULATIONS AND ADMISSIONS DISPENSING WITH PROOF; POLICY: DUTY OF PARTIES TO CONFER

"Stipulations and admissions dispensing with proof or of facts not in dispute are encouraged. It is the duty of the examiner, whenever practicable, to confer prior to the formal hearing with the member's counsel or with the member, if not represented by

counsel, to endeavor to arrive at such stipulations or admissions. Such stipulations or admissions shall bind the parties, unless the hearing panel, for good cause, rejects, or relieves the parties from, such binding effect."

Rule 406:

"RULE 406. TERMINATION BY STIPULATION AS TO FACTS AND DISCIPLINE - CONTENTS OF AND APPROVAL BY PARTIES AND COUNSEL

"The proposed stipulation as to facts and discipline shall set forth each of the following:

"(i) stipulations as to proposed discipline are not binding upon the Supreme Court,

* * *

"The stipulation shall be approved by counsel of record for the member prior to approval by the member. Prior to approval by the examiner, the stipulation shall be approved by the chief trial counsel of the State Bar."

Rule 407:

"RULE 407. TERMINATION BY STIPULATION AS TO FACTS AND DISPOSITION--HEARING AND ACTION THEREON BY HEARING PANEL OR SETTLEMENT CONFERENCE REFEREE.

"(a) If the stipulation as to facts and disposition is entered into at the investigation stage, the review department shall review the stipulation as provided for in Rule 450(b).

"(b) If the stipulation as to facts and disposition is entered into at the formal hearing stage, the hearing panel or settlement conference referee shall examine into the facts or indicated facts, the fairness of the stipulation as to facts and as to disposition, and the effect of the stipulation upon the matters which are or may be client security fund matters or serious offenses. The hearing panel or settlement conference referee may order the approval of the proposed stipulation or its approval with modifications to the stipulation accepted by the parties. Thereafter, the review department shall review the order approving the stipulation as provided in Rule 450(b).

"(c) In cases of adoption of the stipulation by the review department, if suspension or disbarment is provided for, the stipulation, the order approving the stipulation, if required, the action of the review department and the formal record in any formal proceeding upon which discipline is based shall be filed with the Clerk of the Supreme Court. The record need not include a reporter's transcript unless required by the Supreme Court."

Rule 408:

"RULE 408. TERMINATION BY STIPULATION AS TO FACTS AND DISPOSITION--BINDING EFFECT: REJECTION OF.

"(a) Once adopted by the review department, a stipulation as to facts and disposition shall bind the parties in the proceeding or investigation. Once approved, the stipulation may not be withdrawn or modified without the written approval, upon good cause shown and notice duly given, of the referee or hearing panel having approved the stipulation or, of the presiding referee. Any request for a withdrawal or modification of the stipulation must be served

and filed within fifteen (15) days of service of the order approving the stipulation."

II

STATEMENT OF FACTS

A. The Nature of The State Bar of California.

The State Bar of California ("State Bar") is a public corporation. It is established as a constitutional agency under the judicial branch of government. All persons licensed to practice law in California are members of the State Bar. Cal. Const., art. VI, § 9. All property of the State Bar is held for essential public and governmental purposes in the judicial branch of government, and all income therefrom is exempt from taxation. Cal. Bus. & Prof. Code, §§ 6008, 6008.2.

The State Bar was initially integrated in 1927 pursuant to statute. Cal. Stats.

1977, ch. 34. See Cal. Bus. & Prof. Code, §§ 6000-6206.

All State Bar functions are public as established by California law. Constitutional, statutory, rule and decisional duties fall into several categories, among which the principal ones are:

1. The State Bar, in the exercise of its constitutional duties, appoints four members of the Judicial Council and two members of the Commission on Judicial Performance. Cal. Const., art. VI, §§ 6, 8.

2. The State Bar is the administrative arm of the Supreme Court of California. Brotsky v. State Bar, 57 Cal.2d 287, 300 (1962). The State Bar is charged with the administration, implementation and enforcement of legislative and Supreme Court standards governing admission to practice law, e.g., Cal. Bus. & Prof. Code, §§ 6046,

6060-6066; Cal. Rules of Court, rule 957; In re Admission to Practice Law, 1 Cal.2d 61 (1934), and the discipline of persons admitted to practice and those who would seek readmission after disbarment or resignation, e.g., Cal. Bus. & Prof. Code, §§ 6075-6086.6; Cal. Rules of Court, rules 951-952; Jacobs v. State Bar, 20 Cal.3d 191 (1977); In re Walker, 32 Cal.2d 488 (1948). The State Bar must administer, implement and enforce programs ordered by the California Supreme Court concerning specialization, Bar Misc. 4681, and practical training of law students, Bar Misc. No. 4089.

3. The State Bar is charged with enforcing the state law relating to unlawful practice of law and unlawful solicitation of professional employment. Cal. Bus. & Prof. Ccde, §§ 6030, 6125-6131, 6150-6154.

4. The State Bar is charged with the administration, implementation and enforcement of state law governing law corporations. Cal. Bus. & Prof. Code, §§ 6160-6172; Cal. Corp. Code, § 10830; pt. IV, div. 3, tit. I of Cal. Corp. Code (§ 13400 et seq.).

5. The State Bar is required to assist the California Law Revision Commission, Cal. Gov. Code, § 10307, and it aids in all matters pertaining to the advancement of science of jurisprudence and to the improvement of justice in California. Cal. Bus. & Prof. Code, § 6031.

6. The State Bar or a designated agency of the State Bar is required to evaluate the judicial qualifications of all potential appointees and nominees for judicial office who are nominated by the Governor of California pursuant to subdivision (d) of section 16 of article VI

of the California Constitution. Stats. 1979, ch. 534, § 2 (adding Cal. Gov. Code, § 12011.5). The State Bar is also required to establish and promulgate rules and procedures regarding the investigation of the qualifications of candidates for judicial office. Stats. 1979, ch. 534, § 2(e).

7. The State Bar is required to establish, maintain and administer a system and procedure for the arbitration of disputes concerning fees charged for professional services by members of the State Bar or by members of the bar of other jurisdictions. Cal. Bus. & Prof. Code, §§ 6200-6206.

In relation to the discipline of lawyers, the State Bar has the authority to conduct investigations (Cal. Bus. & Prof. Code, §§ 6040-6045); to establish disciplinary boards (the State Bar Court) to

act in matters relating to the discipline and reinstatement of lawyers (Bus. & Prof. Code, § 6086.5); to adopt rules of procedure (Bus. & Prof. Code, §§ 6025, 6086); with the approval of the Supreme Court, to adopt rules of professional conduct that are binding on members of the State Bar (Bus. & Prof. Code, §§ 6076, 6077); and, subject to petition for review by the Supreme Court, to impose public or private reprovals on members of the State Bar or to recommend their disbarment or suspension from the practice of law (Bus. & Prof. Code, § 6078).

B. The Facts of this Case.

This is an appeal from a denial by the Supreme Court of California of a petition for review by appellant, Mark Oring ("Oring"), of the action of the Review Department of the State Bar Court of The State Bar of California of June 2, 1987 in

In the Matter of Mark H. Oring

(84-0-131 LA). That action was:

> "RESOLVED that the stipulation entered into on December 5, 1984, between the Respondent and the Office of Trial Counsel that Respondent, Mark H. Oring, would accept the discipline of public reproval imposed upon David Grey, his then partner, is hereby adopted." (Appendix A, Jurisdictional Statement, App. 1.)

Oring had previously stipulated to accept the discipline imposed upon David Grey ("Grey"), Oring's law partner. Appendix D, Jurisdictional Statement (App. 8) and appendix E, Jurisdictional Statement (App. 12); Brief of Appellant ("Br. App."), pp. 8, 45. Grey had received a public reproval (a comparatively mild form of discipline; only a private reproval is less severe) for the identical radio advertisement for professional employment that is at issue in the instant proceeding (Grey v. State Bar of California,

U.S. S.Ct. No. 86-791), cert. denied Jan. 12, 1987).

The facts of this case are not in dispute and indeed are stipulated. Appendix D, Jurisdictional Statement. In or about 1982, Oring and his then partner, Grey (lawyers), engaged in a radio advertising program concerning their availability for professional employment. One such radio "spot" consisted of a former client speaking as follows:

> "I was rear ended on the San Diego Freeway and all my medical bills were piling up and the insurance company was giving me a hard time, constantly harassing me, just all in all gave me a bad time. I contacted an attorney friend that I knew. He told me that he usually does not take cases that might go to trial. And he recommended me to Grey and Oring. They immediately took the case and we finally ended up in court. I got a nice award of money and all of a sudden I got a phone call from Grey and Oring. They hadn't liked the way the insurance company had treated me and they wanted to take them to trial and suddenly the insurance

> company offered me a settlement of double the amount of the original trial. If I had any legal problem, car accident or anything, I would definitely go back to Grey and Oring. I certainly do believe that."[1]

This message was followed by an announcer stating,

> "Grey and Oring. That's G-r-e-y and Oring, a private law firm. If you have an automobile accident, you need a lawyer. Grey and Oring. 558-8000. There's no charge for consultation. 558-8000."

Appendix D, Jurisdictional Statement, App. 9.

Thereafter a State Bar investigation ensued and on April 24, 1984, a Notice to

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[1] Counsel for the State Bar cannot be certain from the information of the advertisement whether Sharon S.'s bad faith insurance claim was a first party claim against her own insurer, or a third party action against her opponent's insurer. Because Oring cites Egan v. Mut. of Omaha Ins. Co., 24 Cal.3d 809, 157 Cal.Rptr. 482 (1979), rather than Royal Globe Ins. Co. v. Superior Court, 23 Cal.3d 880, 153 Cal.Rptr. 482 (1979), it is assumed that Sharon S.'s claim was against her own insurance company.

Show Cause[2] was issued against Grey and Oring, charging the dissemination of a communication concerning their availability for professional employment which was false, deceptive or which tended to confuse, deceive or mislead the public and which omitted to state all facts necessary in order to make the statements contained in the advertisement not misleading to the public, in violation of rule 2-101, Rules of Professional Conduct.

---

2 On January 11, 1983 an investigation referee had declined to issue a Notice to Show Cause on the ground that rule 2-101(D) was unconstitutional and that there was no evidence by the State Bar that suggested the advertisement was misleading. Joint Appendix, appendix A, p. 1. However, upon request of the State Bar Examiner, further proceedings were ordered (pursuant to rule 512 of the Rules of Procedure of the State Bar as they then existed). Thereafter, a different investigation referee considered the matter and a Notice to Show Cause was issued. Oring has not contended that this procedure in any way violated his rights.

Thereafter, on December 5, 1984, Oring and the State Bar entered into a Stipulation as to Facts and Disposition. Oring and the State Bar stipulated that the advertisement was caused to be broadcast by Grey and Oring; the statements made by Sharon S. were extemporaneous and true and were not discussed with either Grey or Oring when recorded, nor were Grey, Oring or any member of their office present when the radio spot was recorded, and at the time Oring engaged in the advertising program he was aware of rule 2-101 and, in particular, Presumption (2), adopted pursuant to rule 2-101(D), which states "(2) a 'communication' which contains testimonial about or endorsements of a member is presumed to violate rule 2-101, Rules of Professional Conduct." Rule 2-101(D), Standard (Presumption) 2.

On the same date, Oring and his counsel entered into a document entitled "Stipulation Re: Filing and Force or Effect of 'Stipulation as to Facts and Disposition'" which provided:

> "that said Stipulation [Jurisdiction Statement Appendix D] shall be of no force or effect unless and until a final disciplinary Order is made and entered as against Respondent DAVID A. GREY. Any order so made as to DAVID A. GREY shall not be deemed 'final' unless and until all appeals, petitions for hearing, petitions for certiorari, etc. have been exhausted at all State and Federal levels should GREY seek such relief.
>
> "In the event GREY should be exonerated or . . . otherwise discharged without the imposition of any discipline, the Stipulation [Appendix D, Jurisdictional Statement] shall be of no force or effect . . . it being the intention of the parties and counsel herein that ORING shall not be subject to any greater degree of discipline at any time as [sic] the degree of discipline ultimately imposed upon GREY. (Appendix E, Jurisdictional Statement, App. 12-13.)"

The intent of Oring in entering into the stipulations was that "whatever happens to Mr. Grey would happen to Mr. Oring." Appendix A, Joint Appendix, p. 5. See also, Br. App., p. 8, "The parties agreed to a punishment consisting of a public reproval, subject to the second stipulation below," i.e., to the stipulation set forth in appendix E, Jurisdictional Statement, App. 12-13.

The Hearing Panel approved the stipulation[3] but declined to find culpability because it found rule 2-101 unconstitutional. The Hearing Panel stated it "need not and does not make a determination of whether the advertisement here involved is or is not misleading."

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[3] No motion to modify either stipulation was ever made by Oring. See rule 408, Rules of Procedure. In 1987, after the Grey matter was final, the Review Department approved the stipulation as to Oring. See, infra, p. 26.)

Appendix B, Jurisdictional Statement, App. 6.

On October 23, 1985, the Review Department of the State Bar Court in the matter of David A. Grey adopted the findings of fact stipulated to by Oring and the State Bar but made no mention of approving the stipulation. The Review Department found:

> "7. The above quoted presumption adopted pursuant to Rule 2-101(D), Rules of Procedure of the State Bar, is constitutional as applied to Respondent, David A. Grey. Respondent failed to present evidence sufficient to rebut said presumption."[4]

---

[4] Grey was apparently more interested in attacking the constitutionality of the rule than in proving the advertisement was not misleading. The following colloquy took place at the Hearing Panel argument:

> "Referee Kellner: . . . We could find this was a testimonial - in a narrow opinion - that it's not misleading, and that's the end of this case. . . .
>
> "Mr. Ruben: [Counsel for Grey] . . . [T]hat this is not misleading even with the
>
> (continued...)

The Review Department "[f]urther resolved that Respondent David A. Grey is hereby publicly reproved." Appendix F, Jurisdictional Statement, App. 15-17.)

By order dated July 15, 1986, the Supreme Court of California denied Grey's petition to review the State Bar Review Department's imposition of public reproval. David Ashburn Grey v. State Bar, No. L.A. 32152, Cal. S.Ct. No. S002271. On October 31, 1986, Grey filed a petition for writ of certiorari with this Court. David Ashburn Grey v. State Bar of California, U.S. S.Ct. No. 86-791. On January 12, 1987, this Court denied Grey's petition for writ of certiorari. ____ U.S.____, 107 S.Ct. 885, ___ L.Ed.2d ___ (1987). On April 16,

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[4](...continued)
> presumption is really the one result we didn't want. . . . (R.T. Dec. 5, 1984, 24:4-14.)"

1987, the State Bar Review Department denied Grey's request for stay and reconsideration.

Following Grey's exhaustion of all avenues of appeal, the imposition of discipline imposed on October 23, 1985 became final.

On June 2, 1987, the Review Department approved the stipulation entered into by Oring and the State Bar and imposed on Oring a public reproval, the identical discipline imposed on Grey. Appendix A, Jurisdictional Statement, App. 1-3.

Oring then petitioned the California Supreme Court for a writ of review. On October 28, 1987, the California Supreme Court denied review, thereby preserving the discipline imposed by the Review Department. Appendix C, Jurisdictional Statement. On January 7, 1988, Oring appealed to this Court from the final judgment of the California Supreme Court. Appendix G,

Jurisdictional Statement. On June 30, 1988, this Court noted probable jurisdiction.

III

SUMMARY OF ARGUMENT

Oring's constitutional challenge to the California judgment imposing a public reproval on him for airing a testimonial advertisement on the radio fails to take into account that the First Amendment protection heretofore accorded to commercial speech does not embrace misleading and deceptive communications. Also, it fails to address the fact that the adoption of the presumption triggering disciplinary proceedings herein is a valid exercise of the State's power and authority to protect the members of the public who consume legal services.

Moreover, Oring does not recognize that whether the presumption is applied or not, Oring's advertisement is not shielded by the

First Amendment because it is misleading in that it is ambiguous, omits material facts, appeals to the emotional rather than rational side of the intended listener, and constitutes nothing more than a testimonial as to quality. As a result, his testimonial advertisement falls far outside the ambit of the type of commercial advertising which was assumed to lead to the "informed and reliable decision making" contemplated in Bates v. State Bar of Arizona, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1976).

California's regulations for lawyer advertising are no more extensive than necessary to protect its citizens and are narrowly drawn. The regulations permit all forms of advertising, including advertisement by radio and television, so long as the advertisement is true, and is neither misleading nor coercive. The

Preamble to the California Advertising Rules states that the purpose of the Rules is

> "To foster and encourage the free flow of truthful and responsible information to assist the public in recognizing legal problems and in making informed choice of legal counsel." Rule 2-101, Rules of Professional Conduct.

The California restrictions comply with the test set forth in Central Hudson Gas and Electric Corp. v. Public Service Commission, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). California has a substantial state interest in restricting misleading commercial speech, and testimonials in general are misleading. They focus the consumer on the wrong information, i.e., the emotional identification with the endorser, rather than upon factual information. Testimonials generally do not contribute to informed and reliable decisionmaking in choosing a lawyer. Moreover, they are rife with possibilities for abuse. For example,

advertisers could provide the testimonial of the one client for whom they obtained an acquittal and ignore the many others who languish in jail because of inadequate representation. The appeal of testimonials is based on the source of the information rather than the information provided. Testimonial advertising readily lends itself to omission and misrepresentation, as is recognized by Federal Trade Commission regulations.

California regulations are no more extensive than required to serve its interests. In order to assist members of the Bar to know in advance what kinds of advertisement might prove deceptive, misleading or coercive, the State Bar rules provide for the adoption of standards that do not forbid all testimonial advertising, but merely shift to the lawyer who advertises the burden of demonstrating that

an advertisement is not untruthful or deceptive. Thus, a lawyer such as Oring, who advertises with a testimonial, must, if challenged, come forward with a showing by a preponderance of the evidence as to why the testimonial is not misleading. A valid testimonial is itself such evidence and can usually pass muster by providing more, not less, information.

The California presumption rule meets the constitutional test of inferential relationship between the basic fact and the presumed fact. The testimonial presumption is reasonable and not arbitrary, and it provides minimum interference with lawyer advertising.

However, with or without the presumption, Oring's testimonial advertising is misleading, although every word in it is stipulated to be true. It is misleading because it omits to state facts necessary to

discern that the double recovery by the client was because of insurance company bad faith and that, although many people are unhappy with insurance companies, very few will have a cause of action for bad faith. The testimonial is misleading because it portrays a highly successful result based upon the opinion of a happy client who in actuality has no ability to assess whether the result was good or bad. The testimonial is misleading because it portrays the litigation process as simple, easy and sudden. In addition, the ad contains little hard, factual information and is fundamentally a representation of quality which, according to this Court, cannot be measured and may be so likely to be misleading as to warrant restriction. Bates, 433 U.S. at 383, 384.

Moreover, Oring's effort to overturn the decision of the California Supreme Court

is flawed insofar as he fails to show any reason why the stipulation as to facts and discipline that he agreed to is not binding upon him. At no point during the disciplinary proceedings did he ever cast doubt on its binding effect. No greater discipline was imposed than was specified in the stipulation. Under California law, the stipulation is final. Innis v. State Bar of California, 20 Cal.3d 552, 558 (1978).

Public policy also supports the upholding of the California Supreme Court judgment. Pursuant to statute, rules of professional conduct and long-standing tradition, lawyers are held to a higher standard of ethics and honesty than most other professions and trades. When lawyers enter the commercial advertising arena, that higher standard is not, and should not, be diminished. The duties placed on California attorneys to be truthful to prospective and

potential clients are of no less importance than those which must be accorded current clients, the court, and other parties to litigation. Granting the relief that Oring seeks would seriously undermine the commitment that lawyers undertake--to deal in utmost good faith and candor.

IV

ARGUMENT

A. THE ADVERTISEMENT AS A WHOLE IS A TESTIMONIAL AS TO QUALITY AND NOT PROTECTED BY THE FIRST AMENDMENT

1. Oring's Testimonial Advertisement Is a Representation of Quality and Is Misleading

The Sharon S. advertisement used by Grey and Oring to promote their legal services to the public was a cleverly constructed testimonial by a former client who had been injured in an auto accident. Sharon S. recounts how Grey and Oring immediately took her case, helped her get a "nice award" at trial and then, unexpectedly

and suddenly, procured for her a double recovery from an insurer.

Sharon S.'s testimonial includes the assertion that "[i]f I had any legal problem, car accident or anything, I'd definitely go back to Grey and Oring. I certainly do believe that." Taken together with the image of a case instantly taken up by Grey and Oring, effortlessly leading to a sudden, double recovery and the overall tenor of the testimonial, these statements comprise a representation of quality and, as such, are misleading.[5]

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5 Oring suggest that Sharon S.'s statements were to be taken as mere "puffing." However, when "puffing" includes such specific "facts" as "two times the amount of the original trial" without further explanation, it crosses the boundaries of harmlessness. "Puffing that misstates material facts is not protected speech." S. Makar, Advertising Legal Services, 37 Univ. Florida L. Rev. 969 (1985). "The right of a commercial speaker not to divulge accurate information regarding his services is not such a fundamental right." Zauderer v. Office of

(continued...)

"Advertising claims as to the quality of services . . . are not susceptible to measurement or verification; accordingly, such claims may be so likely to be misleading as to warrant restriction." Bates, supra, 433 U.S. at 383-384. Applicant's advertisement is misleading in that it is, both by specific content and by virtue of its nature, a representation of quality.

"In fact, because the public lacks sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising." Bates, supra, 433 U.S. at 383-384. Oring's advertisement, while true in a technical sense, is misleading. It

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[5](...continued)
Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626, 652, 105 S.Ct. 2265, 85 L.Ed.2d 652 (1985).

does not tell all that should be told, most importantly, that the sudden "double recovery" resulted from a second cause of action (in addition to the auto accident personal injury action): an insurance bad faith claim, a rarely available cause of action. As such, it is impermissible in legal advertising.[6]

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6 Oring argues that the testimonial in question is analogous to the accurate drawing of the Dalkon Shield in Zauderer. 471 U.S. at 647. Br. App., pp. 12-13. In that case, the "accurate representation [had] no features that are likely to deceive, mislead, or confuse the reader." Id. at 647. Rather, it presented a clear and objectively verifiable picture of a medical apparatus, which had caused injury to a large number of women and was the subject of thousands of actions.

Unlike the subjective testimonial in the instant case, the illustration of the Dalkon Shield made no claims as to the quality of attorney Zauderer's legal services. The court observed, "[i]ndeed, because it is probably rare that decisions regarding consumption of legal services are based on a consumer's assumptions about qualities of the product that can be represented visually, illustrations . . . will probably be less likely to lend

(continued...)

First Amendment protection is not accorded to lawyer advertising which is misleading. See Zauderer, supra, 471 U.S. at 638. If experience has shown a particular form of advertising to be misleading, even though that form of advertising may not at first seem to be, on its face, inherently misleading, the state may impose reasonable restrictions. In re R.M.J., 455 U.S. 191, 202, n. 11, 102 S.Ct. 929, 936, n. 11, 71 L.Ed.2d 64 (1982). Testimonial advertising, as demonstrated by Oring's advertisement, constitutes such a case.

> "[W]hen the particular content or method of the advertising suggests that it is inherently misleading or when experience has proven in fact such advertising is subject

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[6](...continued)
themselves to material misrepresentation." Id. at 649. The use of a simple printed illustration in an advertisement is clearly distinguishable from the use of language (testimonials) that can mean many things to different people.

> to abuse, the states may impose appropriate restrictions." In re R.M.J., 455 U.S. 191 at 203.

One commentator has put it this way:

> "As early as 1929 the courts recognized that testimonials have a stronger appeal to members of the purchasing public than other types of advertising. For this reason such statements may be more, not less, obnoxious to the law." E. Kinter, A Primer on the Law of Deceptive Practices (Macmillan 2d.ed. 1978) p. 151.

In summary, testimonials contain statements of personal experience which have little use beyond speaker-identified representation of quality. Because no hard facts which are capable of valuation and measurement are presented, the testimonial's worth rests on the credibility of the speaker. This is an emoticnal, rather than rational, appeal.[7] Moreover, their limited-

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[7] The radio spot advertisement at issue in this proceeding is particularly devoid of any hard information. Indeed, it is difficult for even lawyers to tell from the advertisement what really occurred, let
(continued...)

length format accentuates the danger of omission. For these reasons, testimonials are inherently misleading absent some "clear and conspicuous" caveat or adequate information that is contained in the advertisement.

The possibilities for deception in testimonial advertising are numerous. The acclaiming client may be an attorney's single satisfied customer among many others who feel ill-served. A description by an unsuspecting client of a settlement quickly reached may in fact reflect a claim compromised for far less than its actual value. One acquittal endorsed by the client at liberty may, if it be known, be compared to a far more representative string of guilty verdicts. The celebrity of the

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[7](...continued)
alone the illiterate and functionally illiterate listeners to whom the advertisement is apparently directed. Br. App., p. 13.

endorser may far overshadow any actual informational value useful in making an informed and reliable decision that might be presented in the ad.

2. Congress and the Federal Trade Commission Have Recognized that Testimonial Advertising Requires Certain Restrictions.

The Federal Trade Commission Act defines "false advertisement" as follows:

> "The term false advertisement means an advertisement, other than labeling, which is misleading in a material respect, and in determining whether any advertisement is misleading, there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, sound or any combination, therefor, but also the extent to which the advertisement fails to reveal facts material in the light of such representations or material, with respect to consequences which may result from the use of the commodity to which the advertisement relates, under the conditions prescribed in said advertisement or under such conditions as are customary or usual." (Emp. added.) 15 U.S.C. § 55(a)(1).

The Federal Trade Commission rules provide, in relation to testimonial and endorsement advertising, as follows:

> "Endorsements must always reflect the honest opinions, findings, beliefs, or experience of the endorser. Furthermore, they may not contain any representations which would be deceptive, or could not be substantiated if made directly by the advertiser." (Emp. added. 16 C.F.R. 255.1.)

Federal Trade Regulations are specific as to:

> "Consumer endorsements.
>
> "(a) An advertisement employing an endorsement reflecting the experience of an individual or a group of consumers on a central or key attribute of the product is representative of what consumers will generally achieve with the advertised product in actual, albeit variable, conditions of use. Therefore, unless the advertiser possesses and relies upon adequate substantiation for his representation, the advertisement should either clearly and conspicuously disclose what the generally expected performance would be in the depicted circumstances or clearly and conspicuously disclose the limited applicability of the endorser's experience to what consumers may generally expect to achieve . . . ." (Emp. added, ibid. 255.2.)

Pursuant to the Federal Trade Commission rule 255.2, Oring's advertisement is deceptive. It omits material information regarding what happened to Sharon S. while not disclosing, much less "disclos[ing] conspicuously," the limited transferability of the experience of Sharon S. to other potential clients.

Further insight into devising and applying appropriate standards in this area is provided as follows:

> "A key concept in deceptive advertising analysis is that omitted information may render an advertisement deceptive. [Citation] This concept is particularly important in the context of advertising statements regarding profitability associated with using the product or service." (Emp. added.) A. A. Caffey & D. J. Kaufman, The Laws of Advertising in Franchising, 412 PLI/Comm 689, 702 (1987).

Authors Caffey and Kaufman continue,

> "The Basic Rules Do Not Change for Testimonials and Endorsements. In general, the same standards apply to testimonial statements as to any other advertising claim. The mere fact that it may have been said by an actual customer does not relieve . . . an advertiser of its responsibility to remove misleading or deceptive statements from its materials . . . . The endorsement itself must not be misleading in the context in which it is used, and may not carry with it deceptive implications as it is presented in the advertisement." Id. at 703-704.

> "Simply stated, false advertising is (1) materially misleading under the circumstances (2) either through statements made or information omitted. This is the standard . . . by which any advertiser's promotional material must be measured." Id. at 697.

Clearly, Oring's advertisement, when measured against these standards, is misleading. Not only does it provide unclear information as to what really happened to Sharon S., as well as grossly

oversimplify the nature of the legal system, but it also omits any reference to insurance bad faith, the real cause of action on which the second "double" recovery was based, and a cause of action that is essentially unavailable to most of the radio-listening public.

3. Oring's Contentions Are Without Merit

Oring contends that "the evidence . . . demonstrates that testimonials depicting a practitioner's attributes are not misleading or deceptive and do not significantly affect purchase probabilities." Br. App., pp. 23/24. Oring cites Murdock and Linenberger, Legal Advertising and Solicitation, 16 Land and Water Law Review, 627, as the source of "the evidence." The passage from which Oring's "evidence" comes, states:

> "Paternalistic judgments of the consumer's ability to evaluate subjective information are

unnecessary. In fact, an experiment involving legal advertising found that practitioner attributes (functional quality, and descriptive) and fee level information (above, at, and below market level) had no significant effects on the purchase probabilities or attitudes of respondents. Instead, the respondent's purchase probabilities and attitudes were significantly affected by the source of the information: direct mail, direct mail plus a friend's recommendation, and a professional referral. Purchase probabilities and positive attitudes increased with the number of sources and as the sources changed from impersonal to personal." (Emp. added.) Id. at 677-678.

Although this "evidence," when set forth without omission, has no direct bearing on testimonial advertising, it is entirely compatible with the proposition that the content of a testimonial is judged by consumer identification with its source.

Moreover, although the entire quoted passage, in context, contains no suggestion that "[c]onversely, the source of the

information, e.g., the fact that the attorney represents IBM" is said to significantly affect purchase possibilities (Br. App., p. 24), Murdock and Linenberger do argue that listing the names of clients regularly represented should be equated to allowing those same clients to express their opinions on quality of service. Id. at 677. If there is any merit to this argument, which we do not here concede, it cannot be stretched to cover the Sharon S. testimonial for the following reasons.

Large public corporations have a responsibility to their shareholders, employees and the markets in which they transact their business. Their decisions involve millions of dollars and have extremely widespread effect. Thus, any decision on behalf of IBM is subject to rigorous real-world accountability. We submit there is an enormous difference

between the implications of IBM's decision to employ a particular law firm and Sharon S.'s personal injury and bad faith lawsuits. Any basis for expertise, or even full understanding of the nature of her legal claims, cannot be assumed or shown for Sharon S.

The danger and power of testimonials is that, by their very nature, they deflect attention from the content of the message to the speaker. Testimonials are in fact distinguishable from other forms of advertising by this unique screening quality: the speaker is assessed first, and any information provided is judged upon the emotional identification the hearer feels toward the speaker. Testimonials, as we have said, rather than inviting objective

questioning of content, demand judgment of the speaker's credibility.[8]

Advertising containing little or no hard factual information, appealing to the emotions of the illiterate or functionally

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[8] Oring contends that testimonial advertising is the "20th century equivalent of the traditional method of obtaining clients based on reputation in the community, citing Bates, supra, 433 U.S. at 374, n. 30. This assertion misses the point made by the court at note 30. Recognizing that "[a]lthough the [referral system relying on reputation in attorney selection] may have worked . . . [in the] small, homogeneous communit[ies of the past], commentators have seriously questioned its current efficacy," the court went on to state that because the typical practice of law has long since been removed from its small town setting, information as to the qualification of lawyers was not available to many and, where available, may be inaccurate or biased. (Id.) We submit the testimonial in this case did not supply much real information.

If anything, testimonials, tied as they are to the credibility of and identification with the speaker, lack the very factors which make reputational systems of referral efficient: a community so small that clients could either know the lawyer or the person recommending the lawyer personally or could otherwise check the credibility of the information provided.

illiterate populace as this one does (Br. App., p. 13), does not serve the "individual and societal interests in assuring informed and reliable decisionmaking," that the Court had in mind when lawyer advertising was accorded First Amendment protection. Bates, supra, 433 U.S. at 364. Nor does it provide the "free flow of commercial information" that was lauded as "indispensable" by the Court in Virginia Pharmacy Board v. Virginia Consumer Council, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976). See also 425 U.S. at 761-765.

Oring also states "[c]ommentators have concluded that testimonials 'greatly help consumers,'" citing Moss, The Ethics of Law Practice Marketing, 61 Notre Dame L. Rev. 601, 621. Br. App., p. 22. Moss is in fact citing to Murdock and Linenberger, supra, at 676-677, and makes basically the same

arguments as Murdock and Linenberger about listing regularly represented clients. The Murdock and Linenberger comments which may have led Moss, et al. to view testimonials as "greatly help[ing] consumers" are essentially an incarnation of the testimonials-as-modern-day-word-of-mouth argument refuted, supra, at n. 8, p. 49, and by this Court in Bates. Sharon S. is not IBM.

Common sense, as well as experience, demonstrates that testimonial advertising is rife with the possibility of deceiving members of the consuming public and that, without some regulation, testimonial advertising by lawyers can lead to serious abuses.

4. Because Testimonial Lawyer Advertising Is Subject to Abuse, the State Has a Substantial Interest in Imposing Reasonable Restrictions on Such Advertising.

California has a substantial interest in protecting its citizens and consumers of legal services from the dangers of deceptive and misleading lawyer advertising. California has done this with rules regarding attorney advertising designed to encourage more, rather than less, information; it has not, however, attempted to prevent attorneys from conveying information to the public. Zauderer, supra, 471 U.S. at 650. The only advertisements subject to prohibition are those which are false, misleading or deceptive, in addition to solicitation which is coercive or conducted by cappers, runners and the like.

Rule 2-101, Cal. Rules of Professional Responsibility.[9]

Contrary to the impression Oring attempts to create, testimonials are, in fact, not prohibited in California. Rather, as discussed below, testimonials are only presumed to be in violation of rule 2-101, and that presumption is rebuttable.

The test for determining whether California regulation of commercial attorney advertising is necessary is contained in Central Hudson Gas & Electric Corp. v.

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9 Three other standards presumed to violate rule 2-101 are not at issue in this case. They involve "'communication[s] which contain guarantees, warrantees or predictions [or are] delivered in person or by telephone to a potential client . . . in such physical, emotional or mental state that he or she would not be expected to exercise reasonable judgment . . . [or] transmitted at the scene of an accident or at or en route to a hospital, emergency care center or other health care facility . . . ." Rule 2-201(D), Rules of Professional Conduct, Standards 1, 3, 4.

Public Service Commission, supra, 447 U.S. at 566.

> "At the outset, we must determine (1) whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. (2) Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine (3) whether the regulation directly advances the governmental interest asserted, and (4) whether it is not more extensive than is necessary to serve that interest." Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n., supra, 447 U.S. at 566.

a. California Has a Substantial Interest in Protecting Consumers of Legal Advertising from Misleading Advertisements.

In Central Hudson, the Court took the position that "[t]he protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation." Central Hudson, supra,

447 U.S. at 563. The limited knowledge of the public, the legal profession's finite capacity to police itself, and the absence of standardization in attorney services combine to produce an advertising situation particularly prone to confusion and abuse. California has a legitimate interest in controlling such potential abuse. In re R.M.J., supra, 455 U.S. at 203.

Although in little more than a decade of professional advertising decisions, many of the justifications traditionally mustered to ban attorney advertising have fallen, these rulings do not diminish the substance of still tenable state interests. Ohralik v. Ohio State Bar Ass'n., 436 U.S. 447, 460, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978).

Among these continuing interests are: ensuring that advertising itself is not misleading, Virginia Pharmacy, supra,

425 U.S. at 771-772; Zauderer, supra, 471 U.S. at 658, n. 2 (Brennan concurring and dissenting); "requiring that lawyers consistently exercise independent professional judgment on behalf of their clients" (Zauderer, supra, 471 U.S. at 678 (O'Connor dissenting); and encouraging the "free flow of truthful and responsible information to assist the public in recognizing legal problems and in making informed choices of legal counsel." Preamble, rule 2-101, Rules of Professional Conduct.

The State Bar's concern with the dangers of testimonials or endorsements which contain implicit representations of quality was neither hypothetical nor speculative when Standard 2-101(D)(2) was adopted by the Board of Governors. Experience and common sense demonstrate daily the pitfalls of such advertising. See

Friedman v. Rogers, 440 U.S. 1, 13, 99 S.Ct. 887, 896, 59 L.Ed.2d 100 (1979); see also Posades de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico, 478 U.S. 328, 106 S.Ct. 2968, 92 L.Ed.2d 266 (1986).

b. California's Presumptions Directly Advance Those Substantial State Interests.

California's restriction on testimonials and endorsements have a substantial connection to a valid state interest, unlike most of the other state regulations regarding professional advertising examined by this Court. Compare Virginia Pharmacy, supra, 425 U.S. 748 (advertising of price of standardized prescription drugs banned to protect ethical and professional standards); Bates, supra, 433 U.S. 350 (advertising of price of "routine" legal services restrained in order to deter shoddy lawyering); In re R.M.J., supra, 455 U.S. 191 (prohibition of certain

listings struck down for failure to demonstrate nexus between substantial state interest and the forbidden listings); Zauderer, supra, 471 U.S. 626 (State concerns regarding dangers of stirring up litigation and difficulty of administration insufficiently connected to support a prohibition of "legal advice" and illustrations in lawyer advertising); Shapero, supra, ___ U.S. ___, 108 S.Ct. 1916, 56 L.W. 4532 (June 1988) (interest in preventing potential for abuse inherent in direct solicitation inadequately related to sustain interdiction of targeted direct mail advertising to persons known to have particular legal needs). Cf. Ohralik, supra, 436 U.S. 447 (ban of in-person solicitation upheld as directly advancing state interest of preventing coercive solicitation by trained advocates).

California's Presumption 2 is directly aimed at the problem of lawyer advertising by endorsement or testimonial, i.e., advertising that provides no hard factual information about legal services but instead deceives and misleads legal service consumers.

c. The Presumption Device of Rule 2-101(D) Is No More Extensive than Necessary to Advance California's Substantial Interest.

The final prong of the Central Hudson analysis asks whether the regulation is more extensive than is necessary to serve the state interest being advanced. Central Hudson, supra, 447 U.S. at 566.

> "[T]he states may not place an absolute prohibition on certain types of potentially misleading information [e.g. testimonials] . . . if the information also may be presented in a way that is not deceptive. In re R.M.J., supra, 455 U.S. at 203.

The presumption instrument of rule 2-101(D) in fact demands that, with testimonials, enough information be presented to prevent its being deceptive. In order to advertise with a testimonial, an advertisement need only comply with the requirements of rule 2-101(2) and (3), i.e., that the advertisement neither contain, omit, nor present material in a manner which would tend to confuse, deceive or mislead the public, in order to escape the operation of the presumption of 2-101(D), Standard (2). Thus, the California interest which is directly advanced by the regulation concerning testimonials and endorsements is the permissible restriction of misleading advertisement. Ohralik, supra, 436 U.S. at 464-465.

The formulation of the California Rules of Professional Conduct relating to lawyer advertising, prior to their presentation in

1978 to the California Supreme Court, took place over a substantial period of time, both before and after Bates. Once this Court decided Bates, The State Bar of California recognized that lawyer advertising was a fact of life, and every effort was made to structure rules that permitted the free flow of truthful and responsible information through advertising. Thus, the only restrictions on lawyer advertising are that it be truthful, nondeceptive, nonmisleading and noncoercive. None of the advertising cases that arose in Missouri (R.M.J.), Ohio (Zauderer), or Kentucky (Shapero) would have occurred in California. Through the Standards adopted by the State Bar, only those special and limited forms of advertising that the State Bar believed to be deceptive or misleading (i.e., warranties, guarantees, testimonials and endorsements) or coercive (personal or

telephonic solicitation of persons who, because of physical or emotional state, are unable to exercise reasonable judgment, or solicitation at the scene of an accident) were delineated. The Bar also sought to provide members with a readily available standard. Moreover, as rule 2-101(D) was enacted to provide some flexibility as the laws of lawyer advertising developed, the State Bar retains authority to adopt additional standards. However, in the ten years that the California rules have been in force, no further standards have been formulated.

Oring ignores the fact that subsection D does not absolutely prohibit any advertisement--it only establishes a presumption that certain types of advertisement violate rule 2-101. If the advertisement is indeed truthful, free of deception and is not harassing, it is a

simple matter for the advertising lawyer to so demonstrate.

California's limited restrictions on attorney advertising are based on the belief that "people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them." Virginia Pharmacy, supra, 425 U.S. at 770, 96 S.Ct. at 1829. The advertisement in question is misleading because it contains too little, rather than too much, information. It constitutes a half-truth and is not free from deception.[10]

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[10] Oring raises the stipulated fact that Sharon S.'s comment were "extemporaneous" as a virtue. Br. App., p. 24. We suggest that Oring, aware of the true circumstances of Sharon S.'s two causes of action and the requirements of rule 2-101 "and in particular, of presumption (2), adopted pursuant to rule 2-101(D) . . ." (appendix D, Jurisdictional Statement, App. 9-10), should have advised her or the

(continued...)

Oring's position contrasts with the view of this Court expressed in Zauderer:

> "Appellant overlooks material differences between disclosure requirements and outright prohibitions on speech. [Ohio] has not attempted to prevent attorneys from conveying information to the public; it has only required them to provide somewhat more information than they might otherwise be inclined to present." Zauderer, supra, 471 U.S. at 650.[11]

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[10](...continued)
ad agency of the few facts which she needed to state in order to prevent the testimonial from being misleading. We submit this virtue of full disclosure should have taken precedence over the extemporaneous nature of the attorney advertising. Also, although the record reflects that Sharon S.'s "statements were not discussed with either Mr. Grey or Mr. Oring and neither they nor any lawyer from their office was present at the time the radio spot was recorded," it does not indicate whether the text that was aired was the whole of Sharon S.'s statement. If only selected portions were broadcast, then Oring declined a second opportunity to ensure that the advertisement was not, by omission, misleading.

[11] See also Bates, supra, 433 U.S. at 384 ("We do not foreclose the possibility that some limited supplementation . . . might be required of even an advertisement of the
(continued...)

d. California's Use of the Presumption Is Constitutional.

In civil matters, the test of the constitutional validity of presumptions affecting the burden of proof is whether a rational connection exists between the fact proved (i.e., the testimonial) and the presumed fact (i.e., that the testimonial violates rule 2-101), and whether that inferential connection is not so unreasonable as to be arbitrary. Tot v. United States, 319 U.S. 463, 467-468, 63 S.Ct. 1241, 1245 (1943).

If the inferential nexus can be demonstrated, the burden may shift. Leary v. United States, 395 U.S. 6, 36, 89 S.Ct. 1531 (1969). A corollary consideration is the comparative

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[11](...continued)
kind ruled upon today so as to assure that the consumer is not misled.")

convenience between the parties of producing evidence of the fact presumed. Tot, supra, 319 U.S. at 467. See also Morris v. Williams, 67 Cal.2d 733, 760, 63 Cal.Rptr. 689, 433 P.2d 697 (1967) (evidence necessary to establish a fact essential to a claim lies peculiarly within the knowledge and competency of one of the parties). In the instant case, like the defendants in Tot and Morris, Oring had "at least an equal familiarity with the facts, and [in commercial speech] in most cases a greater familiarity with them than [the State Bar]." Tot, supra, 319 U.S. at 468-469.

Rule 2-101(D) creates a presumption as is defined in California Evidence Code sections 605 and 606. Rule 2-101(D), Rules of Professional Conduct. See p. 6, above. California Evidence Code section 605 authorizes a presumption to be created in order to implement a public policy; as such,

it does not require the inferential link between the basic and presumed fact discussed above. However, in the case of the presumptions of the Standards promulgated by the State Bar Board of Governors, the rational inferential connection exists as well. The public policy is to prevent deceptive, confusing or misleading attorney advertising through omission or affirmative act. The presumed fact in this case is, in effect, that a testimonial legal advertisement can, unless carefully presented, be misleading through omission and manner of presentation.

Due process is not violated by a presumptive shifting of the burden of proof if the presumed fact is more likely than not to flow from the basic fact giving rise to the presumption. Leary, supra, 395 U.S. at 36.

The standard of proof required in rebuttal is evidence which creates in the minds of those reviewing the testimonial a conviction that the testimonial more probably than not does not violate the provisions of rules 2-101(A)(2) and (3). This is the civil standard of preponderance of the evidence which applies in California unless specific law provides otherwise. See Cal. Evid. Code, § 115, above, at pp. 5-6.

Due process is not violated when an attorney charged with violation of rule 2-101 is apprised of the factual material upon which the State Bar will rely for its decision, in order that he or she may rebut the evidence. Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. 281, 288, n. 4, 95 S.Ct. 438, reh. denied in 420 U.S. 956, 42 L.Ed.2d 447 (1974) quoted in Zauderer, supra, 471 U.S. at 671 (Brennan, concurring and dissenting).

The obvious and appropriate rebuttal to the presumption regarding testimonials is the testimonial itself: Is it truthful? Is sufficiently complete information included? Is misleading or deceptive material excluded? It is either deceptive or not.

Due process requires that the rule disclose the specific issues the attorney charged must meet. In re Gault, 387 U.S. 1, 33-34 (1967), quoted in Zauderer, supra, 471 U.S. at 671 (Brennan, concurring and dissenting).

The Court has stated, "The Fourteenth Amendment's Due Process Clause 'insist[s] that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.'" Grayned v. City of Rockford, 408 U.S. 104, 108-109, 92 S.Ct. 2294 (1972) quoted in Zauderer, supra, 471 U.S. at 665

(Brennan concurring and dissenting).

Brennan comments,

> "Given the traditions of the legal profession and an attorney's specialized professional training, there is unquestionably some room for enforcement of standards that might be impermissibly vague in other contexts; an attorney in many instances may properly be punished for 'conduct which all responsible attorneys would recognize as improper for members of the profession.' [Citation] Zauderer, supra, 471 U.S. at 666 (Brennan concurring and dissenting.)"

Rule 2-101(A) at subdivisions (1), (2) and (3), provides the requisite degree of specificity:

> "(A) A 'communication" . . . shall not:
>
> "(1) Contain any untrue statement; or
>
> "(2) Contain any matter, or present or arrange any matter in a manner or format which is false, deceptive, or which tends to confuse, deceive or mislead the public; or
>
> "(3) Omit to state any fact necessary to make the statements made, in the light of the

> circumstances under which they are made, not misleading to the public; . . . Rule 2-101(1)-(3), Rules of Professional Conduct."

Thus, whether the Court applies the standard of a person of ordinary intelligence or an attorney specially trained, the prohibition against misleading advertising contained in rule 2-101 is not unconstitutionally vague.

Oring is a lawyer. He has a better idea than most as to what the words in his advertisement say and what they do not say. If he had spent a little more time in the preparation of the ad (i.e., any time at all), he would no doubt have added an appropriate explanation or disclaimer. Again, what the State Bar requires is more information--not less--in the ad. If a one-minute spot radio commercial is too short to tell the "whole truth," that is a burden that Oring should bear--not the illiterate or functionally illiterate potential

consumers of legal services whom he was targeting.

The presumption device, because it falls short of an absolute ban on advertisements, passes constitutional muster as a reasonable and the least extensive restriction necessary to serve the State Bar's interest in protecting against misleading lawyer advertising. Central Hudson, supra, 447 U.S. 566, 100 S.Ct. at 2350.

B. REGARDLESS OF THE PRESUMPTION, ORING'S AD WAS MISLEADING AND VIOLATED RULES OF PROFESSIONAL CONDUCT AND WARRANTED DISCIPLINE.

It is well-settled that the First Amendment overbreadth doctrine does not apply to commercial speech. Bates, supra, 433 U.S. at 379-381; Shapero v. Kentucky Bar Ass'n., supra, 56 L.W. at 4535. We have already shown that the California presumption regarding testimonials is constitutional. But regardless of the

presumption, the advertisement in question is not protected by the First Amendment in any event, since it clearly violates both rule 2-101(A)(2) and rule 2-101(A)(3) of the Rules of Professional Conduct. As the starting point of this part of the analysis, therefore, it must be determined whether or not Oring's particular advertisement is misleading.

The stipulation in this case provides:

> "4. The Statements of Sharon S. were extemporaneous and were true and reflected her actual experience as a client of Grey & Oring. Her statements were not discussed with either Mr. Grey or Mr. Oring and neither they nor any lawyer from their office was [sic] present at the time the radio spot was recorded." (Appendix D, Jurisdictional Statement, App. 9.)

There is no finding by the State Bar Court, either by the Hearing Panel or the Review Department, that the advertisement is or is not misleading. However, we submit testimonials can be misleading even if

every word contained therein is true and this advertisement so demonstrates.

"Obviously, much commercial speech is not provably false, or even wholly false, but only deceptive or misleading." Friedman, supra, 440 U.S. at 9-10. Oring's advertisement is such a case. While technically true as far as it goes, it is misleading and deceptive with respect to what it doesn't say.

1. The Advertisement in Question Omits Any Mention of an Insurance Bad Faith Claim and, for All that Appears, the "Double Recovery" Arose Solely from an Auto Accident.

The advertisement begins with the statement by Oring's client, Sharon S., "I was rear ended on the San Diego freeway." The announcer who immediately follows her testimonial then states, "Grey and Oring, That's G-r-e-y and Oring, a private law firm. If you have an automobile accident, you need a lawyer." (Emp. added.) In the

body of the testimonial, Sharon S. relates how she

> "ended up in court . . . [and] got a nice award of money . . . all of a sudden got a telephone call from Grey and Oring . . . [who] hadn't liked the way the insurance company had treated [her] and wanted to take them to trial and suddenly the insurance company offered me a settlement of double the amount of the original trial."[12]

Although there are serious concerns with the confusing information abundant in the advertisement,[13] the more pernicious fact remains that Oring's advertisement, by failing to indicate that Sharon S. obtained

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12 All quoted material, unless otherwise stated, is from Oring's advertisement, the full text of which appears above at page 18.

13 E.g., from whom did Sharon S. obtain a "nice award"? Did she obtain it from the insurer for the other driver or from her own insurance company? (I.e., she could collect from her own insurance company if she had uninsured motorist coverage and the other driver was uninsured.) Which company was it whose conduct Grey and Oring found objectionable? What was the "nice award" and how do we evaluate its niceness?

money under two separate and distinct causes of action, gave the impression that she received "double the amount of the original trial" through the outstanding legal ability of Oring's firm to obtain damages arising solely from her automobile accident. No mention is made in the ad of the term "bad faith" or about a cause of action for insurance company bad faith: for all the ad says, there is only one cause of action involved. The announcer's more authoritative summing up, "If you have an automobile accident, you need a lawyer," reinforces that misleading impression.[14]

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14 Oring suggests that, as a radio ad, the testimonial was directed to illiterates and functional illiterates. (Br. App., p. 13.) If this is in fact the case, that population would likely be among the least likely to recognize that Sharon S.'s recovery was for a claim of bad faith against an insurer, separate and apart from the claim. If anything, the medium of radio serves to further enhance the advertisement's misleading qualities. While a radio advertisement may be "turned off," (continued...)

Although Oring boldly asserts that he in fact did "inform the public about a cause of action based on an insurance company's breach of the covenant of good faith" (Br. App., p. 21), the testimonial not only fails even to hint at a cause of action for bad faith, it effectively conceals that information.

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[14](...continued)
it cannot be re-read to discern its meaning. In addition, it utilizes whatever emotional impact is present in greater measure in the human voice than in written material. Radio advertising would appear to fall somewhere between the "coercive force of the personal presence of a trained advocate," and "means of conveying information about legal services that is more conducive to reflection and exercise of choice." Zauderer, supra, 433 U.S. at 384. Compare Bates, supra, 433 U.S. at 384. ("[T]he special problems of advertising on the electronic media will warrant special consideration.")

California has no restrictions on attorney advertising which relate to the medium by which it is delivered. However, in making an overall determination of whether or not a particular advertisement is misleading, the enhanced impact and effect of the electronic media cannot be ignored.

Oring further compares Sharon S.'s "informing" the public about the bad faith cause of action to the information acquainting persons with their legal rights contained in the Zauderer advertisement. However, his advertisement does not stand up well in this comparison.[15]

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15 The ad in Zauderer read:

> "The Dalkon Shield Interuterine [sic] Device is alleged to have caused serious [health problems and consequences] . . . . If you or a friend have had a similar experience do not assume it is too late to take legal action against the Shield's manufacturer. Our law firm is presently representing women in such cases. The cases are handled on a contingent fee basis of the amount recovered. If there is no recovery, no legal fees are owed by our clients." 471 U.S. at 631.

A comparison of the two advertisements is informative. The Zauderer ad contains specific information about the injury giving rise to the cause of action and the fact that it might not be too late for a lawsuit. Oring's ad contains no information about any cause of action. It refers only vaguely to automobile accidents and does not even

(continued...)

The fact that automobile accidents often result in lawsuits is common knowledge. A cause of action against an insurer for breach of the implied covenant of good faith and fair dealing is a far more esoteric and unfamiliar matter. Moreover, the likelihood that facts constituting a bad faith cause of action will be present in any great number of automobile accidents is virtually nonexistent.

Contrary to Oring's contentions, his ad fails to inform the public about the cause of action for bad faith which resulted in the second recovery for Sharon S., fails to note the rarity of the availability of a bad

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15(...continued)
mention bad faith. Zauderer names the parties, while Oring's ad does not make clear who the defendants were in the bad faith action. Zauderer objectively and clearly informs the reader of legal rights. Oring's ad does not inform as to what the real cause of action in the second recovery was and leads the listener to "great expectations" on the basis of little or no information.

faith claim, and fails to advise that other persons' experiences will be different. Rather, the advertisement, in its silence, takes advantage of public ignorance to create a false impression of a "David" in the person of Grey and Oring taking on "Goliath," the insurance company. Oring's advertisement, by its material omissions, creates an expectation with virtually no probability of fulfillment. See Bates, supra, 433 U.S. at 383, n. 37 ("The determination whether an advertisement is misleading requires consideration of the legal sophistication of its audience.")

2. There Are Other Misleading Aspects to the Advertisement and Their Cumulative Effect Is Overwhelming.

a. What Is a "Nice Award"?

Sharon S. stated that she "got a nice award of money . . . and [that] suddenly the insurance company offered me a settlement of double the amount of the original trial."

Nothing in the advertisement provides a reference point for what Sharon S. might consider a "nice award."[16] Nothing indicates any expertise on her part to determine the value of her case. We are told, however, that the insurance company's offer of "double the amount of the original trial," was sudden. The implication of this information may well be quite different to an experienced attorney, who might question the potential value of a bad faith claim that "suddenly settled," than to a naive potential client who hears only about a quick doubling of money.[17]

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16 E.g., did the award, after attorneys' fees, exceed her medical bills? Would she have been as happy if she had not received the second settlement which was double the amount of her first recovery?

17 Compare FTC v. Standard Educ. Soc'y, 302 U.S. 112, 116, 58 S.Ct. 113, 82 L.Ed. 141 (1937) ("The fact that a false statement may be obviously false to those who are trained and experienced does not change its character, nor take away its

(continued...)

b. <u>The Ease with Which Sharon S. Obtained a "Nice Settlement."</u>

Early in the testimonial, Sharon S. states that "my medical bills were piling up," a common financial hardship. Although this financial fact is included, the entire advertisement makes no mention of having to pay Grey and Oring anything for their services, however reasonable that requirement may have been. We do not contend that the absence of that information in and of itself is deceptive; surely it is commonplace that attorneys get paid for their services. Rather, we contend that the omission of that information from the

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17(...continued)
power to deceive others less experienced. There is no duty resting upon a citizen to suspect the honesty of those with whom he transacts business . . ." (describing a fraudulent representation of a bargain price for an encyclopedia).) This statement applies to the dangers of misrepresentation borne of the gap in experience and training between attorneys and consumers of legal advertising.

advertisement contributes to the overall illusion of ease and effortlessness involved in getting a double recovery of damages.

In sharp contrast is the familiar observation of Justice Learned Hand, "[A]s a litigant, I should dread a lawsuit beyond almost anything else short of sickness and death." L. Hand, <u>The Deficiencies of Trials to Reach the Heart of the Matter</u>, in 3 Association of the Bar of the City of New York, Lectures on Legal Topics 89, 105 (1926). But Oring's advertisement would lead the consumer to believe that it is easy--a snap--to collect from insurance companies if one only retains those expert manipulators of the legal system, Grey and Oring. In addition, as has been noted earlier, we don't know which insurer paid the second "award." The result is that the facts included in the testimonial are ambiguous, and the facts left out cause it

to be misleading. In that aspect, the advertisement is misleading.

c. Lawyers Seldom "Immediately Take the Case."

In Sharon S.'s experience, she was "recommended to Grey and Oring [and] they immediately took the case." The implication that any other potential client would have a similar experience is also misleading. Personal injury lawyers, typically working on a contingency fee basis, must be selective in the cases they accept. Operative facts such as a potential client's injuries and medical history, availability of evidence and witnesses, and issues such as causation and comparative negligence in individual cases, determine whether or not an attorney will take a case. The clear-cut cases which lead to immediate acceptance by an attorney are likely the exception rather than the rule. The fact that the experience of a single

client does not predict the likely experience of other potential clients renders Oring's advertisement misleading and demonstrates why testimonial advertising in general is inherently misleading.

In sum, the numerous misleading statements and omissions in Oring's ad place it squarely in violation of rule 2-101(A)(2) and 2-101(A)(3). The judgment of discipline was fully justified and should be upheld.

C. THE STIPULATION AS TO FACTS AND DISCIPLINE IS BINDING ON ORING AND HE SHOULD NOT BE PERMITTED TO CIRCUMVENT IT.

Oring stipulated to accept the discipline imposed on his law partner Grey. Br. App., p. 8. Grey litigated all the issues raised by Oring and this Court denied certiorari. A public reproval was imposed on Grey, and that discipline is long since final. Oring has never moved to set aside the stipulation. It is recognized that a denial of certiorari is not a ruling on the

merits; subsequent to denial of certiorari in one case, another party in another case may raise the identical issues which the Court may determine to hear and it may ultimately find constitutional infirmity where none was found before. We submit, however, that an appellant should not be permitted to raise such challenges when he has previously entered into a valid stipulation to be bound by what happened in that previous case.

Constitutional rights are waived by counsel every day in countless instances. The key issue has always been whether there was an informed and knowing waiver of those rights. Here, if Oring's stipulation is to mean anything at all, it should mean that he is to receive and accept whatever discipline, if any, is imposed on Grey after Grey has exhausted his constitutional challenges. The stipulation means that

Oring's star rises or falls depending on what happens to Grey. There is nothing in the stipulation that reserves to Oring the right to sit back and await the outcome of Grey v. State Bar and, if he should be dissatisfied with that outcome, pursue the litigation de novo on his own behalf. If stipulations are to have such little meaning, few would be entered into. Oring wants to have his cake and eat it, too.

Oring is an experienced lawyer; he was represented by counsel who has had extensive experience representing lawyers before the State Bar Court. Under California law, a stipulation as to facts and discipline, once approved by the Hearing Panel and the Review Department, is binding on both parties, i.e., the lawyer and the State Bar. The fact that it is not binding on the California Supreme Court does not diminish

its force and effect on the parties themselves.

Rule 408(a), Rules of Procedure of the State Bar, provides that a stipulation as to facts and discipline shall bind the parties in a disciplinary proceeding if adopted by the Review Department. Rule 408(a) reads in relevant part:

> "(a) Once adopted by the review department, a stipulation as to facts and disposition shall bind the parties in the proceeding or investigation. Once approved, the stipulation may not be withdrawn or modified without the written approval, upon good cause shown and notice duly given, of the referee or hearing panel having approved the stipulation or, of the presiding referee. Any request for a withdrawal or modification of the stipulation must be served and filed within fifteen (15) days of service of the order approving the stipulation."

Rule 408(a) provides for withdrawal or modification of such a stipulation. As mentioned above, Oring made no effort at any

time to withdraw or modify the stipulation. It has long since become final.

In California, the ultimate decision as to the degree of discipline to be imposed rests in the California Supreme Court. Neither a lawyer subject to a disciplinary proceeding nor the State Bar can waive the California Supreme Court's authority to independently review the record and impose appropriate discipline. Martin v. State Bar, 20 Cal.3d 717, 723 (1978). That is why every disciplinary stipulation in California, including Oring's, states that it is not binding on the California Supreme Court.[18] However, the California Supreme

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[18] Rules of Procedure of the State Bar, rule 406, reads in relevant part:

> "The proposed stipulation as to facts and discipline shall set forth each of the following:
>
> "(i) stipulations as to proposed discipline are not binding upon the Supreme Court . . . ."

Court has held that parties are bound by their stipulations. In re Duggan, 17 Cal.3d 416, 422 (1976). Only in the event the court is considering the imposition of more severe discipline than that to which the attorney and the State Bar have stipulated will the court relieve an attorney of the stipulation, and then only as to the legal conclusions therein contained. Innis v. State Bar, supra, 20 Cal.3d at 558.

The California Supreme Court did not impose greater discipline than was stipulated to by the parties. Even if it had, Oring would still be bound by the factual stipulation. Innis, supra; Giovanazzi v. State Bar, 28 Cal.3d 465, 470-471 (1980).

Oring nonetheless blithely proceeds as if the stipulation were never executed and never existed. If stipulations are to continue to serve the valid public purposes

of obviating formal proof and reducing the need to try every case in order to obtain a valid judgment, Oring's stipulation should not be set aside.

As the foregoing demonstrates, Oring's contention that the stipulation was not binding on the California Supreme Court and, therefore, was not binding upon him, Br. App., p. 45, is completely without merit.

Also, Oring's argument that because he received a letter saying he could "seek Supreme Court review" of the State Bar Court's action in imposing the public reproval, the impact of the stipulation is erased, ignores established California law: he would not be permitted to attack the discipline imposed unless he could persuade the California Supreme Court that, for some reason, the stipulation should be set aside. This he never tried to do.

Oring's last-ditch attempts to evade and escape from the consequences of his valid stipulation, knowingly executed and never challenged in the California Supreme Court or elsewhere, should not be rewarded. The stipulation should be upheld.

D. THE IMPORTANCE OF THE PUBLIC TRUST PLACED IN THE LEGAL PROFESSION MANDATES A POLICY REQUIRING UTMOST COMMITMENT TO THE QUALITIES OF TRUTH-SPEAKING AND A HIGH SENSE OF HONOR.

Public policy supports efforts by the state to ensure that lawyer advertisements are free from deception and are not misleading. We contend that lawyers are different from practitioners of other trades and professions and must be held to higher standards of truthfulness--standards which the public expects and deserves to see observed and are in fact imposed on attorneys by statute, rules of conduct and long-standing tradition. Lawyers must do more than simply peddle their services on

the street because they do not deal at arms length with their clients or prospective clients. The marketplace rule of caveat emptor does not apply in the legal profession.

In California, a lawyer has a statutory duty to support the law (Cal. Bus. & Prof. Code, § 6068(a)); to maintain the respect due the court (Cal. Bus. & Prof. Code, § 6068(b)); to maintain only such actions as appear just (Cal. Bus. & Prof. Code, § 6068(c)); to employ only such means as are consistent with truth (Cal. Bus. & Prof. Code, § 6068(d); to preserve the confidence of his clients (Cal. Bus. & Prof. Code, § 6068(e)); and to not encourage the continuance of an action from any corrupt motive or intent (Cal. Bus. & Prof. Code, § 6068(f).

The purpose of the Rules of Professional Conduct is, in essence, to

ensure that lawyers "are ethically obligated to put their clients' interests ahead of their own." Shapero, supra, 56 L.W. at 4536, O'Connor dissenting. Examples include the attorney's obligation not to charge unconscionable fees (rule 2-107), not to accept employment without disclosing his relation to an adverse party (rule 5-102), to communicate all written settlement offers (rule 5-105) and, when in trial, not to employ means inconsistent with the truth (rule 7-105).

The California restrictions on lawyer advertising serve the same valid public purposes as do the other Rules of Professional Conduct. They seek to protect clients and prospective clients by "foster[ing] the free flow of truthful and responsible information to assist the public in recognizing legal problems and in making informed choices about legal counsel."

Rule 2-101, Preamble. Those restrictions are aimed at insuring that lawyer ads are true, that they are not misleading, deceptive or coercive, and that they do not contain any material omissions. Other than adhering to these minimal requirements, California lawyers may advertise in any manner they please, in print or on electronic media, and say whatever they wish.

A testimonial advertisement, with its characteristic omission of material facts and its appeal to the emotional rather than the rational side of the persons who hear it, does not provide responsible information upon which the public can make an informed judgment as to the legal services an attorney offers. If anything, testimonials compound the confusion for the unsophisticated viewer, recipient or listener. California rules require only

that a testimonial advertisement, when used, contains sufficient information so that the advertisement does not mislead. Therefore, if a lawyer chooses this form of advertisement, he or she should bear the minimal burden of demonstrating why a particular ad provides complete information and does not mislead. That burden is particularly fair and appropriate, since in the final analysis, only the lawyer is in a position to demonstrate the truthful, non-deceptive nature of his or her ad.

Oring has failed to make any showing at any stage of the disciplinary proceeding as to why his ad is not misleading or deceptive. Yet he concedes that the ad was designed to appeal specifically to the illiterate and functionally illiterate, perhaps the group least able to evaluate its content. He clearly sought to take

advantage of them in advancing his own pecuniary gain.

It would go against the whole fabric of the standards of ethics and professional responsibility of attorneys if misleading ads such as the Oring testimonial are permitted to flourish. A lawyer's commitment and oath to put the client's interest ahead of his or her own and to deal in candor and utmost good faith with clients, third parties and the court at all times will be seriously eroded if there is no longer a duty to speak the truth to prospective clients.

The public has a right to insist that, particularly in matters of truthfulness, lawyers will continue to be held to high standards of conduct. Upholding the California Supreme Court's order of discipline of Oring in no way conflicts with this Court's previously stated positions in

granting First Amendment protection to selected forms of attorney advertising. On the contrary, this case poses a clear opportunity to define the line past which commercial advertising by lawyers may not go: into the territory of the misleading and deceptive communication.

CONCLUSION

The facts are simple and undisputed. Oring made use of a radio advertisement that consisted of a testimonial from a former client who extolled his firm's effectiveness and speed in obtaining a "double recovery" for her following an automobile accident. While the statements in the advertisement were true as far as they went, they did not go far enough to dispel confusion as to what actually happened in the client's case, nor to avoid misleading the listening public on the nature and existence of her two separate causes of action and the likely

unavailability of similar results to future clients. In addition, the advertisement totally ignored the importance of facts, applicable law and factors involved in an attorney's selection of clients in its representations about Oring's firm. Consequently, by failing to provide sufficient and essential information to a public otherwise ill-equipped to evaluate its content and make informed decisions, the testimonial served only to vouch for quality, which is not capable of being measured in any reliable way in the advertising context.

The California Rules of Professional Conduct, consistent with the position taken by the Federal Trade Commission, regulate usage of such testimonials precisely because they are particularly susceptible to abuse. As the Preamble to the State Bar's lawyer advertising rules states, their purpose is

to "foster and encourage the free flow of truthful and responsible information to assist the public in recognizing legal problems and in making informed choices of legal counsel." Operationally, a rebuttable presumption is applied, stating that testimonials and endorsements violate rule 2-101 of the Rules of Professional Conduct concerning communications to obtain professional employment. Thus, the respondent attorney is obliged to show how and why an advertisement falling within one of the categories covered by the rule is not misleading or deceptive.

Contrary to Oring's assertions, however, there is no "blanket ban" on testimonial advertising, and no different treatment provided for in the rules or in the disciplinary proceeding because he chose an electronic medium as opposed to a print medium. What California has is a system

aimed at protecting consumers of legal services, while at the same time allowing dissemination of truthful and meaningful information about lawyers seeking employment opportunities. It is true that the system as presently devised does not tolerate misleading, deceptive or coercive advertising, but in virtually all other respects, it is extraordinarily permissive.

Oring is striving to push First Amendment protection of commercial speech into a new domain: advertising that is misleading and deceptive. Moreover, he attempts to do so with total disregard for his own knowing, prior and binding stipulation as to facts and degree of discipline. The State Bar has abided by its part of the agreement in recommending the same discipline for Oring as his law partner received--public reproval--but Oring wants another shot. Under California law, where

the California Supreme Court has declined to impose greater discipline than that stipulated to by the parties, the stipulation becomes final. That is the situation in the present case, notwithstanding Oring's refusal to accept it.

Finally, the Court is presented with an opportunity to refine and define the line on attorney advertising. If misleading and deceptive advertising becomes the norm, efforts to teach and enforce rules of professional conduct will be so undercut as to be wholly ineffectual. The California approach has balanced the occasionally competing interests of free speech and public protection and acknowledged the continuing responsibilities of members of the Bar to conduct themselves with their past, present and future clients, opposing

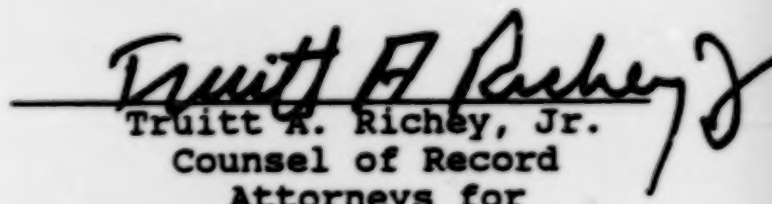
counsel and the courts with a high level of honesty and integrity.

For the foregoing reasons, the judgment of the California Supreme Court should be affirmed.

Dated: September 23, 1988

Respectfully submitted,

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